



Recovering Attorney Fees for Defending Frivolous Claims

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There are two routes to attorney fees for defending frivolous claims – a motion for Rule 137 sanctions and, under rare circumstances, a malicious prosecution claim. Here’s a look at how and when to use both.

You have successfully defeated a lawsuit against your client that you knew was frivolous from the beginning, but only after your client spent thousands in attorney fees. On the heels of that dubious victory, your client asks whether you can recoup those fees.

The easiest and most common option is to file a motion for sanctions pursuant to Illinois Supreme Court Rule 137 (“Rule 137” or “rule”), which allows a party to recover attorney fees spent defending against frivolous litigation. But another possibility – harder to pursue but potentially more rewarding – is an action for malicious prosecution. There, successful defendants turn the tables by filing a new action against defeated plaintiffs in an attempt to collect damages for filing a frivolous claim.¹

This article reviews the procedure for pursuing Rule 137 sanctions and the elements of malicious prosecution, and helps you determine which approach is right for your case.

Seeking Rule 137 sanctions

Rule 137 provides that a party’s or its attorney’s signature on a pleading or other paper constitutes a certification that

to the best of [the signatory’s] knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.²

The rule further provides that where

the pleading or other paper is signed in violation of these requirements, the court may *sua sponte*, or upon motion, award “an appropriate sanction, which may include...the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee.”³ Any motion filed pursuant to the rule must be brought within the same civil action in which the violation occurred and may be brought at any time to address any offending pleading or other paper. At the latest, a motion must be brought within 30 days of entry of final judgment.⁴

The decision to impose sanctions is left to the discretion of the circuit court.⁵ Rule 137 is strictly construed *against* the movant. Accordingly, “the rule is invoked only in those cases falling strictly within its terms”⁶ and is applied only in the most egregious cases.⁷

To that end, courts generally recognize that Rule 137 provides that sanctions may be awarded on three separate bases, all drawn from the language of the rule: where a pleading is 1) not well grounded in fact, 2) unwarranted by existing law, or 3) filed for an improper purpose.⁸

Pleadings not well grounded in fact or unwarranted by existing law – the objective reasonableness test. The touchstone for whether sanctions should be awarded for pleadings that are not well

grounded in fact or unwarranted by existing law is objective reasonableness under the circumstances at the time of filing,⁹ including whether a reasonable inquiry was made regarding the facts and law underpinning a pleading.¹⁰ “In order to avoid sanctions, parties must present objectively reasonable arguments for their view, regardless of whether they are found to be correct.”¹¹ Accordingly, whether a party’s position was subjectively reasonable is irrelevant – it is not sufficient if a party “honestly believed” that its pleading was reasonable.¹²

Rule 137 obligates attorneys to inves-

1. Malicious prosecution claims may be pursued in connection with both civil and criminal proceedings. This article considers solely the former. For discussion of criminal malicious prosecution, see, e.g., *Hurlburt v. Charles*, 238 Ill.2d 248, 938 N.E.2d 507 (2010); *Swick v. Liautaud*, 169 Ill.2d 504, 662 N.E.2d 1238 (1996).

2. Ill. S. Ct. R. 137.

3. *Id.*; see also, e.g., *Thomas v. Hileman*, 333 Ill. App.3d 132, 139, 775 N.E.2d 231, 236-37 (4th Dist. 2002); *Kennedy v. Miller*, 221 Ill.App.3d 513, 525, 582 N.E.2d 200, 208 (2d Dist. 1991) (affirming *sua sponte* award of sanctions).

4. Ill. S. Ct. R. 137.

5. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill.2d 460, 487, 693 N.E.2d 358, 372 (1998).

6. *Gershak v. Feign*, 317 Ill.App.3d 14, 22, 738 N.E.2d 600, 608 (1st Dist. 2000) citing *Dowd*, 181 Ill.2d at 487, 693 N.E.2d at 372, and *In re Estate of Hoover*, 155 Ill.2d 402, 419, 615 N.E.2d 736, 743 (1993).

7. *Barrett v. Fonorow*, 343 Ill.App.3d 1184, 1197, 799 N.E.2d 916, 927 (2d Dist. 2003).

8. Ill. S. Ct. R. 137.

9. *Whitmer v. Munson*, 335 Ill.App.3d 501, 514, 781 N.E.2d 618, 629 (1st Dist. 2002); *Anderson v. Schlosser*, 267 Ill.App.3d 351, 353-54, 642 N.E.2d 194, 196 (3d Dist. 1994).

10. *In re Schneider*, 298 Ill.App.3d 103, 108-09, 697 N.E.2d 1161, 1165 (1st Dist. 1998).

11. *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App.3d 21, 73, 922 N.E.2d 380, 427 (1st Dist. 2009); *Barrett*, 343 Ill.App.3d at 1199, 799 N.E.2d at 928; *Ambrose v. Thornton Township School Trustees*, 274 Ill.App.3d 676, 685, 654 N.E.2d 545, 551 (1st Dist. 1995).

12. See, e.g., *Sterdjevich v. RMK Management Corp.*, 343 Ill.App.3d 1, 19, 796 N.E.2d 1146, 1160 (1st Dist. 2003).

tigate the facts underlying a pleading before filing it.¹³ Pleading allegations that are knowingly false, could easily have been revealed as false upon reasonable inquiry,¹⁴ or are unsupported by specific facts are all sanctionable.¹⁵

Rule 137 also obligates attorneys to abandon a theory that does not pan out. Thus, defending allegations at summary judgment that were revealed as unfounded during discovery¹⁶ or forcing a plaintiff to go to trial in hopes that it will

there must be evidence of subjective bad faith.²⁹

Sanctions in these cases appear to be awarded most frequently for repeat conduct, such as repeatedly raising an argument that was rejected and not appealed³⁰ or attempting to relitigate issues already determined in the same³¹ or a different³² case. They also can be awarded for other improper purposes, such as filing pleadings to attempt to gain an advantage in other litigation.³³

Amount of sanctions awarded. As with the decision to award sanctions in the first place, the extent of the sanctions is left to the court's discretion.³⁴ The rule allows for an appropriate sanction that may include attorney fees. A fee award occurs in most cases³⁵ but is not required.³⁶

Where only a portion of the initial pleading is sanctionable, the court exercises its discretion to determine the amount of fees attributable to the offending pleading.³⁷ Where the entirety of an initial pleading is sanctionable, the case law diverges on the appropriate fee amount. Some courts consider the details and refuse to award fees considered unnecessary,³⁸ such as those attributable to procedurally improper motions³⁹ or proceedings that did not implicate a party's interests.⁴⁰

Other courts, however, hold that it is not necessary to examine each separate time entry.⁴¹ In fact, some hold that it is an abuse of discretion not to award the entire amount of attorney fees in a case initiated by a sanctionable pleading, even where some fees were arguably not necessary.⁴²

Pursuing a malicious prosecution claim

Another option for recovering attorney fees open to selected successful defendants is a malicious prosecution claim. While taking this route can lead to a more expansive recovery than sanctions, it is also substantially more difficult to navigate successfully.

16. *Walsh v. Capital Engineering & Manufacturing Co.*, 312 Ill.App.3d 910, 918-19, 728 N.E.2d 575, 581-82 (1st Dist. 2000); see also *Sanchez v. City of Chicago*, 352 Ill.App.3d 1015, 1021-22, 817 N.E.2d 1068, 1074-75 (1st Dist. 2004) (failing to report to arbitration panel and to court that witnesses refuted their earlier statements at their depositions was sanctionable).

17. *Koch v. Carmona*, 268 Ill.App.3d 48, 56, 643 N.E.2d 1376, 1381 (2d Dist. 1994).

18. *Gambino*, 398 Ill.App.3d at 73, 922 N.E.2d at 427; see also *Barrett*, 343 Ill.App.3d at 1199, 799 N.E.2d at 929 (sanctions unwarranted where precedent available is limited and has not yielded an "established" interpretation of statute); *Polsky v. BDO Seidman*, 293 Ill.App.3d 414, 427-28, 688 N.E.2d 364, 373-74 (2d Dist. 1997) (sanctions unwarranted where party unsuccessfully argued that one of two sets of divergent authorities should apply); *Amalgamated Transit Union, Local 900 v. Suburban Bus Division of the Regional Transportation Authority*, 262 Ill.App.3d 334, 342, 634 N.E.2d 469, 475 (2d Dist. 1994) (sanctions inappropriate where argument supported by some precedent).

19. *McCloughry v. Village of Antioch*, 296 Ill.App.3d 636, 646, 695 N.E.2d 492, 500 (2d Dist. 1998); *Rios v. Valenciano*, 273 Ill.App.3d 35, 40-41, 652 N.E.2d 416, 419-20 (2d Dist. 1995).

20. *Amadeo v. Gaynor*, 299 Ill.App.3d 696, 702-04, 701 N.E.2d 1139, 1143-45 (2d Dist. 1998).

21. *Rios*, 273 Ill.App.3d at 40-41, 652 N.E.2d at 419.

22. *Hess v. Loyd*, 964 N.E.2d 699, 705-06 (5th Dist. 2012); *Baker v. Daniel S. Berger, Ltd.*, 323 Ill.App.3d 956, 965-66, 753 N.E.2d 463, 471 (1st Dist. 2001); *Mentzer v. Dudley*, 236 Ill.App.3d 726, 729-30, 602 N.E.2d 934, 936-37 (4th Dist. 1992).

23. *Nelson v. Chicago Park District*, 408 Ill.App.3d 53, 68-69, 945 N.E.2d 634, 648-49 (1st Dist. 2011).

24. *Wren v. Feeney*, 176 Ill.App.3d 364, 365, 531 N.E.2d 155, 155-56 (3d Dist. 1988).

25. *People v. Stefanski*, 377 Ill.App.3d 548, 552, 879 N.E.2d 1019, 1023 (2d Dist. 2007).

26. *Sundance Homes, Inc. v. County of DuPage*, 195 Ill.2d 257, 286-87, 746 N.E.2d 254, 271 (2001).

27. *Jurgensen v. Haslinger*, 295 Ill.App.3d 139, 144-45, 692 N.E.2d 347, 351-52 (3d Dist. 1998); *Ambrose*, 274 Ill.App.3d at 685, 654 N.E.2d at 551.

28. *Hess*, 964 N.E.2d at 703, 707; *Zabel v. Cohn*, 283 Ill.App.3d 1043, 1055, 670 N.E.2d 877, 884 (1st Dist. 1996).

29. *Stefanski*, 377 Ill.App.3d at 552, 879 N.E.2d at 1023, *Barrett*, 343 Ill.App.3d at 1200, 799 N.E.2d at 930.

30. *Schneider v. Schneider*, 408 Ill.App.3d 192, 203-04, 945 N.E.2d 650, 660-61 (1st Dist. 2011).

31. *Stickler v. American Augers, Inc.*, 325 Ill.App.3d 506, 515, 757 N.E.2d 573, 580 (1st Dist. 2001); *Kennedy*, 221 Ill.App.3d at 525, 582 N.E.2d at 208.

32. *Nelson*, 408 Ill.App.3d at 69, 945 N.E.2d at 648; *Marvel of Illinois, Inc. v. Marvel Containment Control Industries, Inc.*, 318 Ill.App.3d 856, 868, 744 N.E.2d 312, 322 (2d Dist. 2001); *Singer v. Brookman*, 217 Ill. App.3d 870, 879-80, 578 N.E.2d 1, 6 (1st Dist. 1991).

33. *Hess*, 964 N.E.2d at 703, 707.

34. *Nelson*, 408 Ill.App.3d at 70, 945 N.E.2d at 634.

35. See *Sanchez*, 352 Ill.App.3d at 1023, 817 N.E.2d at 1076 (noting that "most" Rule 137 sanctions involve attorneys' fees).

36. Ill. S. Ct. R. 137; *Sanchez*, 352 Ill.App.3d at 1023, 817 N.E.2d at 1076; *Kennedy*, 221 Ill.App.3d at 525, 582 N.E.2d at 208.

37. See, e.g., *Swanson*, 258 Ill.App.3d at 163, 630 N.E.2d at 197 (award of 20% of fees where one of two counts asserted against certain defendants was sanctionable).

38. See, e.g., *Nelson*, 408 Ill.App.3d at 70, 945 N.E.2d at 649.

39. *Jurgensen*, 295 Ill.App.3d at 145, 692 N.E.2d at 352.

40. *In re Schneider*, 298 Ill.App.3d at 110, 697 N.E.2d at 1166.

41. *Robertson v. Calcagno*, 333 Ill.App.3d 1022, 1028-29, 777 N.E.2d 547, 552 (1st Dist. 2002).

42. *Rios*, 273 Ill.App.3d at 41, 652 N.E.2d at 420; *Ashley v. Scott*, 266 Ill.App.3d 302, 307, 640 N.E.2d 677, 681 (2d Dist. 1994).

Rule 137 sanctions and not malicious prosecution claims should be the first option because sanctions are easier to obtain.

be unable to make its case where the denial of negligence is unfounded are also sanctionable.¹⁷

Similarly, sanctions are appropriate for filing a pleading unwarranted by existing law – e.g., where a party asserts a proposition contrary to established precedent,¹⁸ fails to address controlling law,¹⁹ or cannot cite case law to support its theory²⁰ and makes no good-faith argument for modifying existing law.²¹ Sanctions are also awarded where a party asserts a cause of action but 1) fails to meet one or more established elements,²² 2) is barred by *res judicata*²³ or the statute of limitations,²⁴ or 3) repeatedly fails to follow local rules providing for proper notice of motions.²⁵

However, the rule is not intended "to stifle good-faith arguments for the extension, modification, or reversal of existing law."²⁶ Such "good faith" arguments must, however, be objectively reasonable in light of existing law.²⁷

Pleadings interposed for an improper purpose – bad faith or bad motivation. When courts consider whether pleadings were interposed for an improper purpose, they look at the motivation behind the filing and not whether it was objectively reasonable. In particular, courts look for evidence that the pleading was filed to harass, cause unnecessary delay, or needlessly increase the cost of litigation.²⁸ Some courts suggest that

13. *In re Schneider*, 298 Ill.App.3d at 108-09, 697 N.E.2d at 1165.

14. *Sterdjevich*, 343 Ill.App.3d at 21, 796 N.E.2d at 1162.

15. *In re Schneider*, 298 Ill.App.3d at 109-110, 697 N.E.2d at 1166; *Swanson v. Cater*, 258 Ill.App.3d 157, 162-63, 630 N.E.2d 193, 197 (2d Dist. 1994).

The four elements. Malicious prosecution is an action to recover damages proximately caused by a previous unsuccessful civil suit prosecuted without probable cause and with malice.⁴³ This claim may be asserted against the party that brought the lawsuit and its attorney.⁴⁴

Illinois courts have repeatedly held that malicious prosecution actions are disfavored in the law⁴⁵ because “the courts of law are open to every citizen upon the penalty of lawful costs, and he may have his rights determined without the risk of being sued and having to respond in damages for seeking to enforce his right.”⁴⁶ This policy is evidenced by the paucity of reported decisions in favor of malicious prosecution claims – whether upholding complaints or affirming judgments in favor of malicious prosecution plaintiffs.

To state a claim for malicious prosecution, a plaintiff must demonstrate that (a) he or she won a “favorable termination” of the suit; The defendant brought it (b) without probable cause but (c) with malice, and (d) the plaintiff suffered arrest, seizure of property, or other special damage beyond the normal expense, time, or annoyance arising from an ordinary form of legal controversy.⁴⁷

Favorable termination. The first element of a malicious prosecution claim is termination of the underlying lawsuit in favor of the malicious prosecution plaintiff. The Illinois Supreme Court adopted the Restatement (Second) of Torts’ view of this element,⁴⁸ which provides that a case is favorably terminated where the claim (1) was adjudicated in favor of the malicious prosecution plaintiff by a court or other tribunal (this includes dismissal with prejudice, summary judgment, or trial); (2) was dismissed for want of prosecution; or (3) was withdrawn or abandoned by the malicious prosecution defendant.⁴⁹

Although there does not appear to be any significant authority on point, showing favorable termination by way of adjudication or dismissal for want of prosecution should be straightforward. Indeed, a plaintiff likely can provide the order reflecting the adjudication or dismissal to meet this element.

The Illinois Supreme Court held that whether a “withdrawal or abandonment” constitutes favorable termination depends on the circumstances under which the claim is withdrawn. In particular, “a favorable termination is limited

to only those legal dispositions that can give rise to an inference of lack of probable cause.”⁵⁰

Thus, the favorable termination requirement is not satisfied where the case is dismissed to allow for re-filing in another forum, because that is not a termination at all.⁵¹ Moreover, a dismissal secured by settlement is not favorable termination because it is by agreement.⁵² Similarly, a dismissal obtained upon acceptance of a tender is not favorable termination because payment by a defendant is evidence of probable cause for filing suit.⁵³ On the other hand, a dismissal for failing to comply with discovery is favorable termination because that outcome is concomitant to a failure to prosecute.⁵⁴

Probable cause. The second element of a malicious prosecution claim is that the underlying proceeding was brought without probable cause. Probable cause exists in a civil suit where the facts “would lead a person of ordinary caution and prudence to believe that he had a justifiable claim against the defendant.”⁵⁵

While the reported decisions are few, probable cause generally exists where the facts support the legal elements of the claim.⁵⁶ Conversely, there is no probable cause where no facts underpin the key elements of a claim.⁵⁷

Probable cause may also be determined as a matter of law. For example, where the court enters a judgment for the plaintiff – even if that judgment is later reversed – a trial court is unlikely to find for a plaintiff that lacked probable cause.⁵⁸

Malice. In the malicious prosecution context, “[m]alice has been defined as being actuated by improper and indirect motives,”⁵⁹ i.e., a motive other than achieving the objective of the lawsuit.⁶⁰ Malice may be demonstrated directly or inferred from a lack of probable cause.⁶¹

Only one reported decision appears to have considered malice based on direct evidence. In *March v. Caccioppo*, a landlord confessed judgment against a tenant and garnished his bank account. However, the landlord admitted that the lease was never signed (a requirement to confess judgment), and the parties agreed the lease would be rescinded.⁶² The landlord also admitted that the lease had no acceleration clause but the judgment and garnishment reflected rent through the end of the lease.⁶³ The court found malice because the defendants

“intentionally committed wrongful acts without legal justification.”⁶⁴

Malice may also be inferred from a lack of probable cause.⁶⁵ This is only appropriate where there is other evidence of malice⁶⁶ or no credible evidence to

43. *Freides v. Sani-Mode Manufacturing Co.*, 33 Ill.2d 291, 295, 211 N.E.2d 286, 288 (1965).

44. *Abrams v. State Farm Fire & Casualty Co.*, 306 Ill.App.3d 545, 552, 714 N.E.2d 92, 96-97 (1st Dist. 1999) (affirming determination that insurance policy did not cover fraud claims); *Smith v. Aaron, Aaron, Schimberg & Hess*, 112 Ill.App.3d 653, 655, 445 N.E.2d 67, 68 (2d Dist. 1983), abrogated on other grounds by *Cult Awareness Network v. Church of Scientology International*, 685 N.E.2d 1347, 1351, 1353 (1997) (see *infra* note 48); *Berlin v. Nathan*, 64 Ill.App.3d 940, 948, 381 N.E.2d 1367, 1372 (1st Dist. 1978).

45. See, e.g., *Cult Awareness*, 685 N.E.2d at 1357; *Schwartz v. Schwartz*, 366 Ill. 247, 250, 8 N.E.2d 668, 670 (1937); *Shedd v. Patterson*, 302 Ill. 355, 359, 134 N.E. 705, 706 (1922).

46. *Shedd*, 302 Ill. at 359, 134 N.E. at 706; see also *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 628, 51 N.E. 569, 571 (1898) (“If [malicious prosecution] actions are allowed, it might oftentimes happen that an honest suitor would be deterred from ascertaining his legal rights through fear of being obliged to defend a subsequent suit charging him with malicious prosecution.”)

47. *Cult Awareness*, 685 N.E.2d at 1350; *Bank of Lyons v. Schultz*, 78 Ill.2d 235, 239, 399 N.E.2d 1286, 1288 (1980). Some courts add a fifth element – that the defendant instituted the underlying action. See, e.g., *Equity Associates, Inc. v. Village of Northbrook*, 171 Ill.App.3d 115, 118, 524 N.E.2d 1119, 1122 (1st Dist. 1988). This element is sometimes in dispute in malicious prosecution cases founded on criminal proceedings, e.g., *Thieme v. MacArthur*, 285 Ill. App. 242, 253, 1 N.E.2d 514, 518 (2d Dist. 1936), but should not be disputed in the context of civil litigation, where plaintiffs sue the entity that filed and pursued the offending pleadings.

48. *Cult Awareness*, 685 N.E.2d at 1352-53, citing Restatement (Second) of Torts § 674, comment j. *Cult Awareness* overruled a long line of appellate court decisions holding that favorable termination was satisfied “only by ‘a judgment which deals with the *factual issue of the case*, whether the judgment be rendered after a trial or upon motion for summary judgment.” 685 N.E.2d at 1351, quoting *Siegel v. City of Chicago*, 127 Ill.App.2d 84, 108, 261 N.E.2d 802, 814 (1st Dist. 1970).

49. *Cult Awareness*, 685 N.E.2d at 1352-53.

50. *Id.* at 1353.

51. *Id.*

52. *Id.*

53. *Schwartz*, 366 Ill. at 252, 8 N.E.2d at 671.

54. *Cult Awareness*, 685 N.E.2d at 1353.

55. *Keefe v. Aluminum Co. of America*, 166 Ill. App.3d 316, 317, 519 N.E.2d 955, 956 (1st Dist. 1988); see also *March v. Caccioppo*, 37 Ill.App.2d 235, 245, 185 N.E.2d 397, 401 (1st Dist. 1962) (probable cause exists where the party acts as reasonably prudent men would have in like circumstances).

56. *Aaron, Aaron, Schimberg & Hess*, 112 Ill.App.3d at 655-56, 445 N.E.2d 67, 69.

57. *Hulcher v. Archer Daniels Midland Co.*, 88 Ill. App.3d 1, 4-5, 409 N.E.2d 412, 415-16 (4th Dist. 1980); *March*, 37 Ill.App.2d at 245, 185 N.E.2d at 401.

58. *Keefe*, 166 Ill.App.3d at 318, 519 N.E.2d at 956.

59. *Hulcher*, 88 Ill.App.3d at 5, 409 N.E.2d at 416.

60. *Id.*

61. *Id.*

62. 37 Ill.App.2d at 244, 185 N.E.2d at 401.

63. *Id.*

64. *Id.* at 245, 185 N.E.2d at 402.

65. *Hulcher*, 88 Ill.App.3d at 5, 409 N.E.2d at 415-16.

66. *Id.* at 6, 409 N.E.2d at 416.

refute the inference of malice.⁶⁷ For example, where the plaintiff introduces evidence of damaging statements by the defendant's attorneys, including that "he would get [plaintiff] if it was the last thing he ever did," malice may be inferred from such evidence if there is also no probable cause.⁶⁸

Special injury. The fourth element of a malicious prosecution claim is special

Although Rule 137 sanctions are easier to get, a malicious prosecution action may be a better choice in the right circumstances because it provides more robust relief.

injury. By statute, a successful medical malpractice defendant who files a malicious prosecution claim is not required to prove this element.⁶⁹ Other malicious prosecution claimants find that special injury is the most difficult element to establish. To do so, a plaintiff must demonstrate (1) arrest of the person, (2) seizure of or interference with property, or (3) some other special injury beyond the usual expense, time, or annoyance of being a defendant in a legal controversy.⁷⁰

Arrest. Although more common in the criminal context, civil malicious prosecution claims can be founded on arrest of the person.⁷¹ A couple of reported cases are unsuccessful malicious prosecution claims where plaintiff was arrested, including pursuant to a writ of body attachment arising out of collection proceedings.⁷² These cases do not address special injury, but if arrest were insufficient to meet the special injury requirement in a civil context, surely these courts would have said so.

Seizure of property. Special injury may also be satisfied by establishing seizure of or interference with property.⁷³ Two cases have considered the degree of interference required to meet this element.

In *Bank of Lyons v. Schultz*, the Illinois Supreme Court held that an improper injunction preventing the plaintiff from using insurance proceeds for more than nine years during litigation consti-

tuted sufficient interference with property, particularly in light of the length of time involved.⁷⁴ In *Hulcher v. Archer Daniels Midland Co*, the special damages element was satisfied where the plaintiff's property was subject to attachment as a result of the improper lawsuit.⁷⁵

"Other" injury. The third way to establish special injury is to demonstrate some "other" special injury beyond the usual expense, time, or annoyance of defending against an ordinary form of legal controversy.⁷⁶ Courts have ruled that the following do *not* constitute "other" special injury because they are common in civil litigation: attorneys' fees;⁷⁷ injury to personal or professional reputation;⁷⁸ anxiety, embarrassment, or mental anguish;⁷⁹ time spent defending the case;⁸⁰ lost wages⁸¹ or other income;⁸² reduced credit rating;⁸³ increased insurance premiums;⁸⁴ loss of potential tenants;⁸⁵ loss of potential lending commitments;⁸⁶ payment of insurance premiums and real estate taxes;⁸⁷ and liens on personal property.⁸⁸

The Illinois Supreme Court has held that the key to establishing "other" special injury is showing that the subject controversy is an "extraordinary" as opposed to an "ordinary" form of litigation.⁸⁹ The high court has identified two kinds of "extraordinary" legal controversies.

First, an involuntary bankruptcy petition is an extraordinary form of legal controversy because of its "far reaching and drastic" effects, such as the inability of the alleged bankrupt to conduct business.⁹⁰

Second, the court has twice held that significant repeated litigation is an extraordinary form of legal controversy. In *Shedd v. Patterson*, the plaintiff asserted a malicious prosecution claim against a defendant that filed nine successive suits against it concerning the same issues.⁹¹ The court emphasized that once a party has its "day in court" and its rights have been conclusively determined, it may not return to court to "harass" its opponent about the same issues.⁹²

In *Cult Awareness Network v. Church of Scientology International*, the court held that 21 lawsuits brought nationwide in a 17-month period by different plaintiffs constitute an extraordinary form of litigation.⁹³ There, the national

"onslaught of litigation" upset the balance between "the societal interest in preventing harassing suits and in permitting the honest assertion of rights in our courtrooms." Thus, the "other special injury" requirement was satisfied.⁹⁴ It is unclear precisely how many cases must be filed, but at least one court has refused to extend *Shedd* and *Cult Aware-*

67. *Johnson v. Target Stores, Inc.*, 341 Ill.App.3d 56, 77, 791 N.E.2d 1206, 1223 (1st Dist. 2003) (criminal context); *Salmen v. Kamberos*, 206 Ill.App.3d 686, 691, 565 N.E.2d 6, 10 (1st Dist. 1990) (criminal context).

68. *Hulcher*, 88 Ill.App.3d at 5-6, 409 N.E.2d at 416.

69. 735 ILCS 5/2-109; see also *Miller v. Rosenberg*, 196 Ill.2d 50, 749 N.E.2d 946 (2001) (holding 735 ILCS 5/2-109 constitutional).

70. *Cult Awareness*, 685 N.E.2d at 1354.

71. *Id.*; *Levin v. King*, 271 Ill.App.3d 728, 730-31, 648 N.E.2d 1108, 1110 (1st Dist. 1995).

72. *Parker v. Lent*, 167 Ill.App.3d 27, 28-29, 520 N.E.2d 1035, 1036 (1st Dist. 1988) (summary judgment appropriate for defendant against malicious prosecution claim where plaintiff admitted defendants did not act with malice); see also *Rosenkranz v. Barker*, 115 Ill. 331, 335-340, 3 N.E. 93 (1885) (reversing verdict in favor of malicious prosecution plaintiff arrested pursuant to writ of *ne exeat* for errors in jury instruction and evidentiary ruling).

73. *Cult Awareness*, 685 N.E.2d at 1354; *Bank of Lyons*, 78 Ill.2d at 241, 399 N.E.2d at 1289.

74. 78 Ill.2d at 239, 241, 399 N.E.2d at 1289.

75. *Hulcher*, 88 Ill.App.3d at 8, 409 N.E.2d at 418; see also *Schwartz*, 366 Ill. at 252, 8 N.E.2d at 671 (suggesting this element is satisfied where plaintiff's property is "attached or he was in any way hindered from handling it").

76. *Cult Awareness*, 685 N.E.2d at 1354; *Bank of Lyons*, 78 Ill.2d at 239, 399 N.E.2d at 1288.

77. *Levin*, 271 Ill.App.3d at 736-37, 648 N.E.2d at 1114; *Doyle v. Shlensky*, 120 Ill.App.3d 807, 817-18, 458 N.E.2d 1120, 1129 (1st Dist. 1983); *Petrick v. Kaminski*, 68 Ill.App.3d 649, 651, 386 N.E.2d 636, 638 (1st Dist. 1979).

78. *Equity Associates*, 171 Ill.App.3d at 118, 524 N.E.2d at 1122; *Doyle*, 120 Ill.App.3d at 817-18, 458 N.E.2d at 1129; *Stopka v. Lesser*, 82 Ill.App.3d 323, 324-25, 402 N.E.2d 782-83 (1st Dist. 1980) superseded in part by statute 735 ILCS 5/2-109; *Berlin*, 64 Ill. App.3d at 946, 381 N.E.2d at 1371.

79. *Doyle*, 120 Ill.App.3d at 817-18, 458 N.E.2d at 1128-29; *Stopka*, 82 Ill.App.3d at 324-25, 402 N.E.2d at 782-83; *Berlin*, 64 Ill.App.3d at 946, 381 N.E.2d at 1371.

80. *Keefe*, 166 Ill.App.3d at 318-19, 519 N.E.2d at 956-57; *Doyle*, 120 Ill.App.3d at 817-18, 458 N.E.2d at 1129; *Stopka*, 82 Ill.App.3d at 324-25, 402 N.E.2d at 782-83; *Berlin*, 64 Ill.App.3d at 946, 381 N.E.2d at 1371.

81. *Petrick*, 68 Ill.App.3d at 651, 386 N.E.2d at 638.

82. *Equity Associates*, 171 Ill.App.3d at 118-19, 524 N.E.2d at 1122-23 (rental income and property appreciation).

83. *Petrick*, 68 Ill.App.3d at 651, 386 N.E.2d at 638; see also *Keefe*, 166 Ill.App.3d at 319, 519 N.E.2d at 957.

84. *Stopka*, 82 Ill.App.3d at 324-25, 402 N.E.2d at 782-84 (medical malpractice insurance).

85. *Equity Associates*, 171 Ill.App.3d at 118-19, 524 N.E.2d at 1122-23.

86. *Id.*

87. *Id.*

88. *Schwartz*, 366 Ill. at 252, 8 N.E.2d at 671.

89. *Cult Awareness*, 685 N.E.2d at 1354.

90. *Norin v. Scheldt Manufacturing Co.*, 297 Ill. 521, 525-26, 130 N.E. 791, 792 (1921).

91. 302 Ill. at 360, 134 N.E. at 706-07.

92. *Id.*

93. *Cult Awareness*, 685 N.E.2d at 1349, 1356.

94. *Id.* at 1356.

ness to facts involving only two successive cases.⁹⁵

Recoverable damages

Damages for successful malicious prosecution claims are measured in much the same way as every tort. Successful plaintiffs can recover “damages which have proximately resulted to person, property or reputation.”⁹⁶

Such damages include attorneys’ fees,⁹⁷ loss of employment,⁹⁸ mental suffering and anxiety,⁹⁹ injury to reputation,¹⁰⁰ and punitive damages.¹⁰¹ Ironically, the very “damages” that do not satisfy the special injury element of the claim are recoverable if the malicious prosecution claim is successful.

Rule 137 sanctions or malicious prosecution: which is it?

Illinois courts have repeatedly held that although the remedies are distinct,¹⁰² conduct sanctionable under Rule 137 may also satisfy the elements of malicious prosecution.¹⁰³ Note the similarities between the two remedies. Pleadings not well grounded in fact or law are likely filed without probable cause. Both remedies consider whether the party in question acted reasonably under the circumstances. Filing a pleading for an improper purpose is similar to filing with malice, because both standards examine the subjective intent of the filer.

But take care in choosing a remedy for frivolous litigation.

An unsuccessful motion for Rule 137 sanctions could bar a malicious prosecution action. If a court finds that a complaint is well grounded in fact and law and/or filed with proper motives in connection with Rule 137 sanctions proceedings, a subsequent court is less likely to allow a malicious prosecution action to determine whether that same complaint was brought without probable cause and with malice.¹⁰⁴

Conversely, if a party successfully moves for Rule 137 sanctions, a court may be unlikely to allow a malicious prosecution claim for fear of a double recovery. Regardless whether a Rule 137 sanctions motion is denied or granted, a subsequent malicious prosecution claim could be barred by res judicata or collateral estoppel,¹⁰⁵ especially where the proceedings included a full evidentiary hearing and a written opinion.

Rule 137 sanctions: the first choice. Nonetheless, Rule 137 sanctions and not malicious prosecution claims should be

the first option because sanctions, while still rare, are easier to obtain.¹⁰⁶

First, Rule 137 is a more streamlined process. Rule 137 motions must be brought within the action in which the pleading was filed. Malicious prosecution claims must be separate actions.¹⁰⁷ Obviously, bringing a new civil action and the proceedings that go with it – discovery, motion practice, trial – is far more expensive and time consuming than filing a motion in a mature action before a judge who has likely seen the conduct first hand.

Second, the substantive limitations on malicious prosecution actions make them harder to pursue. For example, the favorable termination requirement forces a party to litigate the offending action to a favorable conclusion before bringing a malicious prosecution claim. If a frivolous case is settled, even for a nuisance-value sum, a malicious prosecution action cannot be pursued.¹⁰⁸ No such limit applies to Rule 137 motions. Indeed, a reported decision awarded Rule 137 sanctions after the parties settled 11 days into trial.¹⁰⁹

More significantly, no special injury requirement applies to Rule 137 sanctions.¹¹⁰ Incurring attorney fees is injury enough to support a sanctions motion.

Malicious prosecution: bigger rewards in the right case. Although Rule 137 sanctions are easier to obtain, however, a malicious prosecution action may be a better choice in the right circumstances because it provides more robust relief.¹¹¹

First, though attorney fees are available under either approach, the amount is left to the court’s discretion under Rule 137, while a successful malicious prosecution plaintiff is entitled to recover all fees caused by the defendant’s wrongful actions. Second, only malicious prosecution claims allow recovery for loss of employment, mental suffering and anxiety, injury to reputation, and even punitive damages.

Third, courts under Rule 137 may only award attorney fees caused by the filing of a specific offending pleading in a single action,¹¹² while malicious prosecution claimants can pursue damages resulting from a multiplicity of actions.¹¹³

Finally, malicious prosecution is a common law tort and thus triable before a jury, while Rule 137 sanctions are decided by the court.¹¹⁴ Juries may be less

^{96.} *Freides*, 33 Ill.2d at 295, 211 N.E.2d at 288; see also *Koris v. Norfolk & Western Railway Co.*, 30 Ill.App.3d 1055, 1060-61, 333 N.E.2d 217, 221 (1st Dist. 1975) (damages must be certain and proximately caused by malicious prosecution (criminal context)).

^{97.} *Gaszak v. Zayre of Ill., Inc.*, 16 Ill.App.3d 50, 59-60, 305 N.E.2d 704, 711-12 (1st Dist. 1973) (affirming verdict including attorneys’ fees (criminal context)); *Stirs, Inc. v. City of Chicago*, 24 Ill.App.3d 118, 124, 320 N.E.2d 216, 220 (1st Dist. 1974) (considering action for improper demolition of building); *Home Investments Fund v. Robertson*, 10 Ill.App.3d 840, 844, 295 N.E.2d 85, 88 (2d Dist. 1973) (considering slander of title claim).

^{98.} *Koris*, 30 Ill.App.3d at 1060-61, 333 N.E.2d at 221.

^{99.} *Gaszak*, 16 Ill.App.3d at 59-60, 305 N.E.2d at 711-12.

^{100.} *Id.*

^{101.} *Aldridge v. Fox*, 348 Ill. App 96, 104, 108 N.E.2d 139, 142 (1st Dist. 1952) (criminal context); *Thomas v. Kerr*, 137 Ill.App. 479, 483 (3d Dist. 1907) (same).

^{102.} *Cult Awareness*, 685 N.E.2d at 1353-54; *William J. Templeman Co. v. Liberty Mutual Insurance Co.*, 316 Ill.App.3d 379, 382, 735 N.E.2d 669, 673 (1st Dist. 2000) (considering whether sanctions are within ambit of the term “malicious prosecution” in insurance policy); *Spiegel v. Zurich Insurance Co.*, 293 Ill.App.3d 129, 134-35, 687 N.E.2d 1099, 1101 (1st Dist. 1997) (same); *Levin*, 271 Ill.App.3d at 737, 648 N.E.2d at 1114.

^{103.} *Hileman*, 333 Ill.App.3d at 140, 775 N.E.2d at 237; *Templeman*, 316 Ill.App.3d at 382-83, 735 N.E.2d at 673; *Arora v. Chui*, 279 Ill.App.3d 321, 331, 664 N.E.2d 1101, 1108 (2d Dist. 1996) (unnecessary to expand tort of malicious prosecution where Rule 137 protects against “false pleadings and meritless claims”), *overruled on other grounds by Cult Awareness*, 685 N.E.2d at 1351, 1353; *Sanelli v. Glenview State Bank*, 126 Ill.App.3d 411, 416, 466 N.E.2d 1119, 1123 (1st Dist. 1984) (sanctions address “conduct in the nature of malicious prosecution”); *Tabor & Co v. Gorenz*, 43 Ill.App.3d 124, 132, 356 N.E.2d 1150, 1156 (2d Dist. 1976) (same).

^{104.} See *Levin*, 271 Ill.App.3d at 737, 458 N.E.2d at 1114 (no need to relax special injury requirement where Rule 137 addresses similar conduct under similar standards); *Hurlburt*, 238 Ill.2d at 255, 938 N.E.2d at 512 (probable cause hearing held in connection with a statutory summary suspension of driver’s license precluded malicious prosecution claim on collateral estoppel grounds).

^{105.} See generally, e.g., *Terry v. Watts Copy Systems, Inc.*, 329 Ill. App.3d 382, 387-89, 768 N.E.2d 789, 795-97 (4th Dist. 2002) (discussing elements of res judicata and collateral estoppel). Conversely, however, it is unlikely that any court would find that a malicious prosecution claim was waived if no Rule 137 sanctions motion was filed. Indeed, that holding would mean that Rule 137 would have swallowed malicious prosecution whole.

^{106.} *Templeman*, 316 Ill.App.3d at 384-85, 735 N.E.2d at 675-76 (“there is greater ease and accessibility to obtain relief under Rule 137 than there is under a malicious prosecution action”).

^{107.} *Hileman*, 333 Ill.App.3d at 140, 775 N.E.2d at 237; *Templeman*, 316 Ill.App.3d at 388, 735 N.E.2d at 677.

^{108.} *Cult Awareness*, 685 N.E.2d at 1353.

^{109.} *Walsh*, 312 Ill.App.3d at 914, 918-19, 728 N.E.2d at 578, 581-82.

^{110.} *Templeman*, 316 Ill.App.3d at 385, 735 N.E.2d at 675.

^{111.} *Levin*, 271 Ill.App.3d at 738, 458 N.E.2d at 1115.

^{112.} See Ill. Sup. Ct. R. 137; *Jurgensen*, 295 Ill. App.3d at 145, 692 N.E.2d at 352; *Ashley*, 266 Ill. App.3d at 306-07, 640 N.E.2d at 680-81.

^{113.} See *Cult Awareness*, 685 N.E.2d at 1356; *Shedd*, 302 Ill. at 360, 134 N.E. at 706.

^{114.} *Templeman*, 316 Ill.App.3d at 384, 735 N.E.2d at 674.

^{95.} *Howard v. Firmand*, 378 Ill.App.3d 147, 153, 880 N.E.2d 1139, 1145 (1st Dist. 2007) (refusing to extend *Cult Awareness* to two successive suits for orders of protection).

hesitant than judges to punish litigants for frivolous litigation.

Can the malicious prosecution elements be satisfied? The key to deciding whether bringing a malicious prosecution claim for frivolous litigation is worth the risk is whether the elements can be satisfied. Favorable termination is a low hurdle, merely requiring an outcome that shows the suit was frivolous in the first place. Likewise, a frivolous

suit was presumably filed without probable cause.

Malice is trickier. While it may sometimes be inferred from the lack of probable cause, showing malice is easier if there is direct evidence of an ulterior motive for the suit.

Toughest of all is special injury. Anyone considering a malicious prosecution claim should be able to show special injury in a recognized category – arrest

of the person, seizure of or interference with property, or an “extraordinary” form of litigation, whether bankruptcy or a pattern of abusive litigation.

If your case falls neatly within one of the special injury categories – and you can meet the rest of the elements – you should seriously consider pursuing the broader remedies available for malicious prosecution. Otherwise, Rule 137 sanctions are your best choice. ■

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